THE

SHERMAN RAILROAD BILL

AND

KINDRED BILLS,

AND

The Powers of Congress in Relation Thereto.

WASHINGTON.
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Mr. Sherman has opened the debate in the Senate upon the Bill reported by the special committee of which he is the chairman. He states the whole case of those who favor such legislation. It is proper, therefore, to review such portions of his argument as relate to this question.

Mr. Sherman, in the first place, asserts that the Act, which he proposes, ought to be passed because "the only access from the North, East or West to Washington is by one railroad, and that a feeder or branch of the Baltimore and Ohio Railroad."

I might comment on the logic of the argument, which maintains the necessity of new lines of railway from Washington to *New York*, to *Cleveland*, and to *Pittsburg*, *because* there is now only one road between *Baltimore* and *Washington*, and *because* that one road is a branch of the Baltimore and Ohio Railroad. I will not, however, pause to make such criticism.

Mr. Sherman further says that "Congress has exclusive jurisdiction over all matters in this District, and this authority involves the duty to secure them modes of transit equal to those enjoyed by other cities within the jurisdiction of a State. Has this duty been performed? Is the access to Washington such as is commensurate with the importance of this city as the home of one hundred thousand persons or as the political capital of the United States? Is the branch of the Baltimore and Ohio Railroad a reasonably sufficient agency to transport all those whose business or pleasure calls them here, and the supplies necessary for their maintenance?"

The authority of Congress to deal with railroad facilities *within the District of Columbia* is fully conceded. Mr. Sherman will, however, scarcely deny that the Washington Branch

of the Baltimore and Ohio Railroad is *sufficient* to transport through the District all persons, from the East, West and North, who seek the Capital either on pleasure or business, and all supplies from those points intended for the use of the inhabitants of Washington, and of the strangers temporarily sojourning there.

If, however, the Washington Branch of the Baltimore and Ohio Railroad was *not* sufficient for these purposes, would Mr. Sherman be justified, *for this reason*, in providing for the building of other railroads in States and localities in which the needs of the traveling public were fully supplied?

Nor will I discuss the tax imposed by the State of Maryland on travel over the Baltimore and Ohio Railroad. If that State has the constitutional power to impose such a tax, it is abundantly justified both in imposing and collecting it.

It has invested more than fifteen millions of dollars, in principal and interest, in the Chesapeake and Ohio Canal, which carries the wealth of the mineral and agricultural sections of Maryland into the markets of the District of Columbia, but yields not one cent of revenue to the State which bore the burden of the outlay.

It has been urged, I am aware, that the opinion of the Supreme Court of the United States in the case of *Crandall* vs. *The State of Nevada*, reported in 6 Wallace S. C. R., p. 39, is in direct opposition to the constitutionality of the tax.

Opinions, however, may differ on this point. If the tax to which objection is made is *legal*, it can be supported on every moral ground; and Mr. Sherman has no right to denounce it, until the question of law is decided.

If, in his judgment, it is not a *constitutional* tax, why is not this question tested directly in the courts?

Must three colossal lines of railway be built, extending over *many* States, because there is, as Mr. Sherman charges, an unconstitutional law among the statutes of *one* State, imposing a tax on passengers through that State?

The *right* of the State to impose the tax, if it has such a right, will not be evaded by granting charters to new roads passing through that State, even if such charters contain an

inhibition of the taxing power by the States, through which the proposed railways may pass. The State may proceed to tax the gross receipts of such roads from passengers notwithstanding; and the question will then be precisely where it is to-day—it must be litigated in the courts.

If, then, the alleged unconstitutional tax, levied by the State of Maryland, be the evil which makes the proposed legislation necessary, why not manfully provide for making a case to test this legal question, instead of chartering three railroad companies, which may increase the evil, but cannot prevent it?

It is difficult to suppose that Mr. Sherman is serious when he urges, as his *chief* argument for the three great *trunk* lines provided for in his bill, the following points founded, *exclusively*, on the case of the Washington Branch Railroad.

"1. That the profit of the Washington Branch is grossly out of proportion to the cost of the branch.

"2. That it is not a direct route except to Baltimore.

"3. That it is not a convenient route, but denies the usual facilities of travel except to Baltimore.

"4. That it is not a cheap route, but, though very profitable, is more expensive than any similar short line, and is used to levy for the State of Maryland an unconstitutional tax."

For does it not appear from this statement that, in the judgment of Mr. Sherman, Congress may authorize a railroad to be built whenever the profits of existing roads are, in its judgment, too great;

Or whenever the existing road is not, in its judgment, a direct route;

Or whenever the existing route is *inconvenient* or *uncomfortable?*

And does it not further appear that the only way which occurs to him of avoiding the payment of an unconstitutional tax on an existing road is *to build a new road?*

I submit that every reason, given by Mr. Sherman in support of his bill would authorize Congress in undertaking the custody of the *hotels* and *markets* of the chief city of the District of Columbia, and of all the cities on the routes of travel to the Capital.

Their profits are out of all proportion to the cost of provisions.

They are not in general conveniently located.

They make very few people comfortable.

They are not cheap, but, though very profitable, are more expensive, than those in other localities.

If the Baltimore and Ohio Railroad Company has ever exceeded its chartered powers, as to rates within the District of Columbia, or elsewhere, the courts of the land afford the means of redress.

It is denied that it has so offended.

Would it not be well for Senator Sherman to see that his charges are capable of proof, before he urges them before the Senate of the United States?

But the question is not only whether Congress *ought* to pass this Bill. It is whether Congress has the *power* to pass this Bill.

We do earnestly believe that the proposed exercise of power is unconstitutional.

The earliest record of the history of the Constitution of the United States is at variance with the existence of the power claimed to be exercised by this Bill.

When the provisions of the Federal Constitution were under debate in the Convention which formed that instrument, on September 14, 1787, it was proposed to add to the powers of Congress *a power to cut canals.*

The whole debate on the subject is full of interest, and we beg leave to quote it, as reported by Madison:

"Dr. Franklin moved to add after the words 'post roads,' Art. 1, sec. 8, a power 'to provide for cutting canals where deemed necessary.'

"Mr. Wilson seconded the motion.

"Mr. Sherman objected. The expense in such cases will fall on the United States, and the benefit accrue to the places where the canals may be cut."

"Mr. Wilson. Instead of being an expense to the United States, they may be made a source of revenue.

"Mr. Madison suggested an enlargement of the motion into a power 'to grant charters of incorporation where the interests of the United States might require and the legislative provisions of individual States may be incompetent.' His primary object was, however, to secure an easy communication between the States, which the free intercourse now to be opened seemed

to call for. The political obstacles being removed, a removal of the natural ones, as far as possible, ought to follow.

"Mr. Randolph seconded the proposition.

"Mr. King thought the power unnecessary.

"Mr. Wilson. It is necessary to prevent a State from obstructing the general welfare.

"Mr. King. The States will be prejudiced and divided into parties by it. In Philadelphia and New York it will be referred to the establishment of a bank, which has been a subject of contention in those cities. In other places it will be referred to mercantile monopolies.

"Mr. Wilson mentioned the importance of facilitating by canals the communication with the western settlements.

"The motion being so modified as to admit a distinct question, specified and limited to the case of canals, Pennsylvania, Virginia and Georgia voted for the proposition; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, North Carolina and South Carolina voted 'No.'"

The refusal by the Convention to give to Congress the power to grant charters of incorporation for such canals as might be deemed necessary, at a period when canals were relied on as the great means of developing the resources of the country, must be taken as an answer to any claim for the constitutionality of such Bills.

James Madison, Alexander Hamilton, Albert Gallatin, and Thomas Jefferson, each and all, have clearly stated that Congress, under the Constitution, did not possess the power to create a corporation capable of making a *canal* within a State without its consent; and it cannot be supposed that they would have entertained any different theory in relation to the construction of a *railroad.*

Such being the express action of the Convention which framed the Constitution, and such the opinions of its framers and chief expounders, it is sufficiently evident why no appropriation ever was made for any internal improvement by the General Government for many years after the adoption of the Federal Constitution.

The legislation of Congress in reference to the Cumberland Road cannot be drawn into a precedent for the Bill creating a corporation and vesting it with powers of *eminent domain.*

It is perfectly well known that by the Act of April 30, 1802, Congress proposed to the convention which formed the Consti-

tution of Ohio to grant to the new State five per cent. of the net proceeds of the future sales of public lands within its boundaries, to be applied to the purpose of making public roads, leading from the navigable waters emptying into the Atlantic, to the said State and through the same.

But it was expressly provided in the Act that such roads should be laid out under the authority of Congress, "*with the consent of the several States through which the road shall pass.*"

This power, which Congress proposed to exercise only with the consent of the States within which it was to be employed, was, moreover, avowedly assumed in consideration of an agreement to be entered into by the State of Ohio to exempt the land sold by the United States, within her territory, from taxation for five years from the date of such sale.

The State of Ohio formally accepted this proposition; and it remained an operative agreement until, by the Act of March 3, 1803, *at the request of Ohio*, three of the five per cent. already referred to was appropriated to the construction of roads within that State.

This act left two per cent. only of the net proceeds of the sales of the public lands applicable to the construction of roads leading from the Atlantic to the State of Ohio.

By the act of March 29, 1806, Congress, in pursuance of this agreement with the State of Ohio, directed the laying out of a road from Cumberland to the State of Ohio, *the expense of which was to be paid out of the fund of two per cent. already referred to.* But it was expressly provided, in this last-mentioned act, that before the said road was made *the consent of the State*, or States, *through which it would pass, should be obtained.*

The State of Maryland, by the act of January 4, 1807, gave the required assent; and the State of Pennsylvania, in April, 1807, and the State of Virginia, near the same period of time, also gave their assent.

So far as *this* precedent is concerned, it cannot in any way avail the advocates of this Bill.

Nor is the legislative history of the country less explicit when we seek its aid in discovering the constitutional powers of Congress.

We learn from the veto message of President Madison, transmitted to Congress on March 3, 1817, that this eminent statesman was not able to derive a power to construct roads and canals either from the power "to regulate commerce among the several States," or from the power "to provide for the common defence and general welfare."

President Monroe, though strongly convinced of the advantage of such improvements, as is testified by his inaugural address on the 5th of March, 1817, was yet satisfied as he clearly disclosed in his message of December 2, 1817, that Congress did not possess the right to authorize such works. In his special message of May 4, 1822, returning with his objections to the House of Representatives the Bill for the preservation and repair of the Cumberland Road, he stated the constitutional difficulties, opposing the exercise of such a power by Congress, in so clear and definite a form, that it would be superflous to repeat here his reasoning. It belongs to the Constitutional History of the Government, and is familiar to the country.

President Jackson in the Maysville Road veto of May 27, 1830, followed substantially the reasoning of President Monroe.

It will not be pretended that any higher authority than is contained in these references can be brought to bear on this question.

I do not profess to know what the Supreme Court will decide when a case is properly brought before it.

In the case of *Gray vs. Clinton Bridge*, decided in Iowa in 1867, Justice Miller, one of the judges of that court, has taken the trouble to travel beyond the record of the case before him, and to give his *individual opinion, as a citizen*, that Congress has the right to prescribe all needful regulations for the conduct of railroad trafic over any railroad forming a part of the lines of inter-State communication, *and may also authorize the creation of such roads, when the purposes of inter-State transportation of persons and property justify, or require it.* Judge Redfield has, in the law periodical under *his* control, advocated the same doctrine. It will be *law* when the *Supreme Court* so holds; until then, it is a mischievous constitutional heresy. The *dictum* of Justice Miller in support of the power

is more than balanced by the *dictum* of Justice McLean against the power in the Rock Island Bridge case. (6 McLean, 525.)

If Contress *has* the power to provide, by direct enactment, for the construction of railways within the States, and to employ the agents of the United States in such works, *it does not follow that it can delegate, irrevocably, this power to private persons, by erecting them into corporations, and making an irrevocable contract with them. The grantees in such a contract are not agents, whose appointment may be revoked, or whose authority may be modified. They are principals and contracting parties, who are, thereafter, if they adhere to the terms of their contract, independent of the control of the Federal or State Government, if the legislation creating them be valid.* If such a doctrine, as Justice Miller contends for, is true, the Congress of to-day might create what corporations it pleased, and donate to them in perpetuity, and to the destruction of many States, every available route of railway travel.

It may be true—though I deny it—that Congress may provide by direct enactment for the construction of a Government railway within a State; but it cannot make a provision for such a work, which would prevent any subsequent Congress from abandoning that route and adopting another. The power of *eminent domain* within a State must be exercised directly by the principal in such case. It cannot be exercised by a contracting party. It cannot be granted by the Federal Government to corporations acting within territories in which the authority of the State is concurrent, even if it be not exclusive.

The question here is not the right of the Federal Government to appropriate money to internal improvements, but it is as to the right of the Federal Government to exercise within a State not only all the power which the State can exercise in relation to, or over a railroad, if it had authorized it, *but also to exclude the very courts of the State in which the proposed railroad is located* from taking cognizance of acts done, or omitted to be done, within the State, by the railroad corporation thus created by Federal authority, *or by the individuals employed by it.* For it cannot be denied that Mr. Sherman's bill, by providing for the right to remove all such cases from the State to the

Federal Courts, practically vests an exclusive jurisdiction over such corporations in the Federal courts.

Federal doctrine was never before pushed to such extremes of practice.

The Supreme Court will never sanction such theories. It will not hold that Congress may, without the consent of a State, confer the power of *eminent domain* within the limits of that State on any corporation. It will not hold that Congress can exclude, by the contrivance of the removal of causes, the jurisdiction of the State courts from attaching to persons and property within the boundaries of the State. It will recognize the plain truth that if, under the Constitution, the United States itself could not acquire land for a *fort* even, or exercise jurisdiction over the very limits of that fort, without the assent of the State in which it was located, it could not, certainly, provide by law for vesting title to land in a private corporation, and for excluding the jurisdiction of the State in any way from persons or property, without the consent of the State affected by the legislation.

The internal improvements of the country, properly so called, owe their origin to the munificence of separate States, or to the enterprise of individuals.

This munificence and this enterprise have been directed to fostering certain natural growths of commerce and industry; to the establishment of certain natural centres of trade, and to the creation of means of communication between them.

No man need be informed how wonderfully this system has prospered, and how certainly this State system of internal improvement has served to diffuse, over the whole land, to almost an equal degree, the advantage of our increasing wealth and population. The burden of bringing the people of one State into communication with the people of another State, has not been assumed by Congress. Each State, and the people of each State, have been left to devise and form channels of intercourse for themselves.

Instead of the experience of the Roman Empire, possessed of grand highways, constructed by the Government through the Territories under its control, which had no other object than to

develop the greatness of the one city, which was the terminal point of these many routes, our established system has as many objects as our States have commercial centres; and what our works may lose in length and in grandeur they make up in practical utility, and in the contentment and prosperity of our people.

Therefore, independently of all constitutional objections to the system proposed to be inaugurated by the Bill in question, its operation would be both unjust and dangerous.

For forty years the Congress of the United States has stood a spectator of the enterprises commenced and carried on under the State system, until these have reached their present great extent and perfection. To the energy with which these undertakings have been conducted and managed, is owing the rapid success of the Government in the late rebellion. The centralized railway systems of France, Austria and Russia never accomplished as much for these Governments in time of war as our local systems of railways achieved for us in the same season of strife. Why is it, when we have reaped such advantage from these local systems in time of war, that we are, when peace has returned, seeking to impair, by national legislation, all confidence in their stability by this novel mode of subordinating them to the influence and combination of political corporations?

The Congress of the United States has claimed and exercised the power of authorizing and aiding railroads which were to be built through its *Territories*. These Territories are under its peculiar legislative control, and constitute a common property within which such authority may be exercised. But nevertheless it may be asked whether Congress is so well satisfied with the wisdom and economy of its railroad legislation for the Territories that it desires to repeat the experiment. The extraordinary and prodigal nature of its grants in aid of these territorial railways may serve to explain the reason why other applicants are crowding in battalions to share in the expenditure, but they scarcely serve to justify the experiment of a repetition of such legislation for railways within the States.

What necessity exists for vesting in incorporators, *as yet*

unknown to the country, the enormous powers which are proposed to be delegated by these Bills? What claim have these unknown corporators (*for the names mentioned in the Bill may not be descriptive of one individual engaged in the undertaking hereafter*) to privileges never before conferred upon any corporation in the history of this Government? What reason is there for clothing *these* with the power of the United States—for placing a Justice of the Supreme Court at their command, as if he were the sheriff of a county—for exempting these corporators from the process of the State courts, and holding them and their servants amenable only to the jurisdiction of the Federal Courts? Why subordinate, practically, works already in being to their enormous power?

Is this to be a Government work? Not so. They are corporations as strictly and essentially private in character and interest as any now chartered by a State. From the moment that their existence is authorized by law, they are as independent of Congress as any State corporation possibly could be. If the public complain of the defaults, of the delays and discomforts of existing roads—that its mails are not delivered in time—that passengers fail to pass by rapid connections over existing routes—how would the public be bettered by this Bill if it became a law?

If the lines which the new companies shall locate or adopt be circuitous routes—if they never make proper schedule time—if their rails are what they please—their outfit, fixtures, structure, and cars for first-class passengers be not what they should be—how will that affect the charters which Congress is called upon to grant?

These charters will remain operative and in force, *enriching their proprietors by means of the extraordinary powers vested in them by a law of the United States*, whether they sell their grant or keep it—whether their action be in accordance with the terms of their grant—or whether it be worse even than the conduct of any railroad corporation which has hitherto been assailed by the friends of the monopolies authorized by this Bill.

The Bills before Congress are manifestly charters seeking subscribers, not subscribers seeking charters. One of the proposed lines is for the benefit of the Pennsylvania Railroad, which, itself, has opposed and protested against its passage. The needed purchaser does not want the dangerous commodity.

But Mr. Sherman is asked, especially, why *new* roads are necessary in every State named in his Bill, *except in the State of Ohio*. In that State *alone, the new railroad lines are authorized to use existing lines*. Everywhere else such use, coalition, or consolidation is impossible, unless the consent of Congress is hereafter given.

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